

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

PETER LYFORD INC. dba SCOTTS LAWN SERVICE

DECISION OF THE HEARING OFFICER

Appearances: Jason Beecher Esq., Attorney for the Claimant
Kenneth D. Murphy Esq., Attorney for the Employer

Nature of Dispute: RSA 275-E: 2 I (a) & (b)
RSA 275-E: 3

Employer: Peter Lyford Inc., dba Scotts Lawn Service, 32 Crosby Road, Dover, NH
03820

Date of Hearing: November 21, 2011 (held open until December 5, 2011 for written closings)

Case No.: 42071

BACKGROUND AND STATEMENT OF THE ISSUES

The claimant filed for protection under the Whistleblowers' Protection Act because he feels that he was terminated for filing complaints for violations of law and for refusing to follow illegal directives. The claimant testified that he worked for the employer (Peter Lyford Inc.) for six and a half years. The company was sold in February of 2010 and he worked for the new employer until his termination from employment in June of 2011.

The claimant is seeking reinstatement of employment, reinstatement of his working license, back wages and benefits, attorney's fees and any other injunctive relief approved by the Hearing Officer.

The claimant testified that he reported the misuse of pesticides, herbicides and insecticides in their use and application. He also stated that he reported the improper storage and disposal of chemicals. The claimant also questioned the employer about false advertising and false billing of clients.

The claimant testified that he reported the violations to his supervisor and was told to continue with his work because the clients were good customers and paid their bills. Most of the complaints were verbal and the claimant was often told to "play ball" and not complain.

The claimant also felt that it was unfair to advertise a certain brand of product and yet only use 30% of that product on a job site. He felt that this was an unfair business practice and

misled the customer/public. He said that he made this complaint many times to his supervisor. The claimant also said that he needed some time off and if that time would have been granted to him, none of this would have happened. The claimant did say that he walked off the job and later tried to apologize and it was not accepted. Any filings with the various control agencies occurred after the claimant left the job.

The employer testified that the claimant did not have any backup to show that certain pesticides, used in lawn care, were being used too close to a body of water and a review of the actual project shows that all "set backs" were followed and there was no violation. The employer also said that there was no problem with the removal of certain product because the company had other employees do it when the claimant refused. The product was also used in some other jobs so it was not entirely thrown away.

The employer also testified that the claimant did not have any knowledge of the billing practices and did not have any knowledge of the agreement with the brand name "Scott" and the percentages that could be used in combining other products with "Scott" product.

The claimant was terminated because of an incident with a piece of equipment and the fact that there was some damage that could only have been caused by misuse of the machine by the claimant. The claimant was told to get his temper under control and the claimant walked off of the job. The claimant later tried to make apologies for his actions but the new employer would not take him back. The written complaints were made after the claimant was terminated from employment by his own action.

FINDINGS OF FACT

RSA 275-E:4 IRSA 275-E:4 Rights and Remedies. –

- I. Any employee who alleges a violation of rights under RSA 275-E:2 or 3, and who has first made a reasonable effort to maintain or restore such employee's rights through any grievance procedure or similar process available at such employee's place of employment, may obtain a hearing with the commissioner of labor or a designee appointed by the commissioner. Following such hearing, the labor commissioner or the designee appointed by such commissioner shall render a judgment on such matter, and shall order, as the commissioner or his designee considers appropriate, reinstatement of the employee, the payment of back pay, fringe benefits and seniority rights, any appropriate injunctive relief, or any combination of these remedies.

Decisions rendered by the commissioner of labor under paragraph I may be appealed pursuant to RSA 541.

RSA 275-E:2 I (a)RSA 275-E:2 Protection of Employees Reporting Violations. –

- I. No employer shall discharge, threaten, or otherwise discriminate against any employee regarding such employee's compensation, terms, conditions, location, or privileges of employment because:
- II. (a) The employee, in good faith, reports or causes to be reported, verbally or in writing, what the employee has reasonable cause to believe is a violation of any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States; or
(b) The employee, in good faith, participates, verbally or in writing, in an

investigation, hearing, or inquiry conducted by any governmental entity, including a court action, which concerns allegations that the employer has violated any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States. I

I. Paragraph I of this section shall not apply to any employee unless the employee first brought the alleged violation to the attention of a person having supervisory authority with the employer, and then allowed the employer a reasonable opportunity to correct that violation, unless the employee had specific reason to believe that reporting such a violation to his employer would not result in promptly remedying the violation.

RSA 275-E:3 Protection of Employees Who Refuse to Execute Illegal Directives. No Employer shall discharge, threaten or otherwise discriminate against any employee regarding such employee's compensation, terms, conditions, location, or privileges of employment because the employee has refused to execute a directive which in fact violates any law or rule adopted under the laws of this state, a political subdivision of this state, or the United States.

These are the sections of the law that the claimant filed under and seeks relief from the termination that he alleges that occurred because of his protected reporting. It is the finding of the Hearing Officer, based on the testimony, evidence and written statements, that the claim under the Act is invalid.

As required by Appeal of Mary Ellen Montplaisir 147 N.H. 297 (2001), this Department is required to apply a "mixed motive" analysis because of the direct evidence presented. Under this analytical framework, the claimant has the initial burden of persuasion. If the claimant meets this burden, the burden of persuasion shifts to the employer to show that despite the retaliatory animus, it would have made the same adverse employment decision for legitimate, non-retaliatory reasons. As long as the claimant can meet the evidentiary burden required by the "mixed motive" analysis, the burden of persuasion remains with the employer.

The Hearing Officer finds that the claimant failed in his burden of persuasion. The claimant did not show that there was adverse action by the employer based on the use of protected rights by the claimant. The claimant did not follow the process while employed by the employer and did not allow for corrective action to be taken. The claimant did make verbal inquiries into certain practices but the employer was credible in the fact that these inquiries did not lead to termination of employment. As required by Appeal of Mary Ellen Montplaisir 147 N.H. 297 (2001), this Department is required to apply a "mixed motive analysis" on the evidence presented. Because of the circumstantial nature of the evidence alleged by the claimant, the analytical framework of a "pretext analysis" is appropriate. Under this analytical framework, the claimant has the initial burden of establishing a *prima facie* case of unlawful conduct/retaliation. This requires the claimant to show:

1. he engaged in an act protected by the statute;
2. he suffered an action proscribed by the statute (discrimination/termination); and
3. there was a causal connection between the protected act she engaged in (her report of late pay and her mention of the Department of Labor) and the action she suffered as a result of that protected act (discrimination and termination).

The establishment of a *prima facie* case creates a presumption that the employer unlawfully retaliated against the claimant. The burden of proof then shifts to the employer to rebut the claimant's assertions with evidence that their action was taken for legitimate, non-retaliatory reason(s). This burden of proof is only one of production. The claimant retains the burden of

proof to persuade. In response to the employer's rebuttal, the claimant has the opportunity to show that the proffered legitimate, non-retaliatory reason for the action was not the true reason for the unlawful conduct/retaliation, and that her assertion was the true reason for the unlawful conduct/retaliation. The claimant can show this by establishing that the employer's proffered reason for the action is either not credible, or by directly showing that the action was more likely motivated by retaliation in response to her protected act.

There is no established case of action in this complaint. The Hearing Officer finds that the claimant did not make any complaints, while employed that would lead to termination.

DECISION

The remedies sought under the Whistleblowers' Protection Act are invalid and the complaint is denied. The claimant did not prove his case.

Thomas F. Hardiman
Hearing Officer

Date of Decision: January 4, 2012

Original: Claimant

cc: Employer

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TFH/all